Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 301

THE TIMKEN-DETROIT AXLE COMPANY,
Petitioner,

vs.

LEMPCO PRODUCTS, INCORPORATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Timken-Detroit Axle Company, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit to review the decree of that Court entered March 12, 1940 (R. p. 387) in a suit for alleged infringement of a patent (rehearing denied May 2, 1940, R. p. 407), reversing the decree of the District Court for the Northern District of Ohio, Eastern Division (R. p. 369; 110 Fed. (2) 307) and directing that the Bill of Complaint (R. pp. 2-7) be dismissed.

A transcript of the record in the case, including the proceedings of said Circuit Court of Appeals has been furnished in accordance with the rules of this Court.

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case arose from an equity suit for patent infringement filed by Petitioner against Respondent. The Federal Rules of Civil Procedure governed all proceedings in the cause. This cause involves the application of and correct appellate Court practice to be followed under Rule 52 in setting aside the findings of fact of the lower Court. The suit against the Respondent, Lempco Products, Inc., is based on a single patent, infringement of which is charged by the Bill of Complaint (R. p. 2). An injunction and an accounting for past infringement is sought as to the patent in suit (R. p. 5).

New Rule 52 in its provisions relating to the review of the Court of Appeals of the findings of fact of the District Judge states that "Findings of fact *shall not be set aside unless clearly erroneous*"* and that "*due regard shall be given to the opportunity of the trial court* to *judge the credibility of the witnesses.*"

The District Court in the instant cause saw and heard all of the witnesses who testified in the cause and held the patent not anticipated, held, upon substantial testimony, that it disclosed an improvement which required the exercise of the faculty of invention and required the exercise of more than mechanical skill, and held the patent valid and infringed. The Court of Appeals found that the patented device had been duplicated and infringed, and that there was no anticipation, but, notwithstanding the District Court had seen and heard the witnesses, *and based on erroneous rulings of fact contrary to undisputed testimony in the record of a witness whose credibility was unquestioned,* found that the patentees had done no more than exercise mechanical skill and that their act did not rise "to the

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* Emphasis ours throughout unless otherwise indicated.

quality of invention," reversing the District Court on a question of fact with instructions to dismiss the Bill.

All of the findings of the District Court upon which the presence of invention was found by that Court in the instant cause were fact findings, and were not only supported by substantial evidence, but were supported by all of the evidence in the record on the findings. The Court of Appeals set aside the District Court's findings of fact, not because of any "clearly erroneous" findings, but reversed the lower Court on its *de novo* consideration of, and its independent findings on the evidence.

B.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

I.

New Rule 52 undertakes to combine the old law and equity practices, the latter of which varied over a wide range all the way from a show of deference to the findings of the District Court, to an adoption of them on the theory that they were binding. Under the law practice prior to the rule, the reviewing court could not review the evidence or set aside the findings if there were substantial evidence to support them. Under the old equity practice, it was sometimes thought that the findings below were binding upon the upper court (*Tilghman vs. Proctor,* 125 U. S. 136; *Warren vs. Keep,* 155 U. S. 265). Others thought they were admonished to accept the findings below (*Morgan vs. Daniels,* 153 U. S. 120, 124), while others, and this seems to have been the text book rule, thought that the findings were merely persuasive and entitled to deference, due or otherwise (*Cyc. of Fed. Procedure,* Vol. 6, Sec. 2989, 628 and 629).

It was the purpose of the new rule to unify these practices into the mandatory practice of the equity side, as is

explained from the appearance of the "shall" in Rule 52. Those who promulgated the rule stated that it was intended to merge the old law and the equity practices into the equity practice, as exemplified by *Tilghman v. Proctor, supra,* and *Warren v. Keep, supra.* The courts below are still following the various practices on the equity side, some of them considering that they shall not overrule the findings below, and the others holding to no such binding effect, but still following the practice of admonition or persuasion. The first of these is illustrated by the practice in the Eighth Circuit (*Strong-Scott v. Weller,* 112 F. (2) 389, 393, 395), and in the Seventh Circuit (*Webb vs. Frisch,* 111 F. (2) 887, 888). In the Sixth Circuit, as illustrated in the instant case, the Sixth Circuit Court of Appeals followed the persuasion or admonition practice in total disregard of the "shall not," or mandatory practice upon precisely the same question as was involved in the Eighth Circuit case. Such a situation calls for the supervision of the court of supreme authority that the practice may be stabilized and unified.

II.

Since the promulgation of Rule 52 diversity of practice has arisen in the Circuits below as, for example, between the Eighth Circuit (*Strong-Scott v. Weller,* 112 F. (2) 398, 393, 395 and Seventh Circuit (see *Webb v. Frisch,* 111 Fed. (2) 887, 888), on the one hand, and the Sixth Circuit in the instant cause on the other hand. In the Eighth and Sixth Circuit cases the diversity of practice is upon the same kinds of findings on precisely the same questions (the patents being different, of course). It is, therefore, respectfully submitted that the language of Rule 52 should be interpreted and the practice thereunder established by a Court of supervisory authority, such as this Court.

III.

There is diversity of practice in the Sixth Circuit, on the one hand, and the Seventh, Eighth, and Ninth Circuits, on the other hand, with respect to Rule 52 of the new Federal Rules of Civil Procedure. In particular, there is diversity of practice in these circuits in the weighing of evidence relating to prior use, etc., in patent causes where the function and performance, as well as the character of device, must be proved beyond a reasonable doubt.

IV.

The practice of the Court of Appeals below *defeats* the plain purpose of this Rule 52.

WHEREFORE, Your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 8,042, Lempco Products, Inc., Defendant-Appellant versus The Timken-Detroit Axle Company, Plaintiff-Appellee, and that the said decree of the Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem mete and just.

THE TIMKEN-DETROIT AXLE COMPANY,

By F. O. RICHEY,
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